

ANALYSIS OF AMENDED BILL

Author: Leno Analyst: Darrine Distefano Bill Number: AB 2927
Related Bills: See Legislative History Telephone: 845-4142 Amended Date: April 17, 2006
Attorney: Patrick Kusiak Sponsor: _____

SUBJECT:	Public Records Disclosure/State Agency Internet Web Sites/Public Information Center
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SUMMARY

This bill would require a state agency to include specific information on its web site about requesting copies of public records.

SUMMARY OF AMENDMENTS

The April 17, 2006, amendments delete language relating to the Business and Professions Code and add the language discussed in this analysis.

This is the department's first analysis of this bill.

PURPOSE OF THE BILL

According to the author's office, the purpose of the bill is to ensure the public has unrestricted access when requesting a copy of a public record by requiring state agencies to make information available on their web sites.

EFFECTIVE/OPERATIVE DATE

This bill would be effective January 1, 2007, and apply to requests on or after that date.

POSITION

Pending.

ANALYSIS**FEDERAL/STATE LAW**

The Freedom of Information Act (FOIA) generally provides that any person has the right to request access to federal agency records or information. All agencies of the Executive Branch of the United States Government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by law.

Board Position:

_____ S	_____ NA	_____ NP
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_____ N	_____ OUA	_____ <u>X</u> PENDING

Department Director

Date

Selvi Stanislaus

7/5/06

FOIA also directs each federal agency to provide an electronic access mechanism for disseminating records to the public.

The Department of Justice's Office of Information and Privacy is the principal contact point within the executive branch for advice and policy guidance on matters pertaining to the administration of FOIA. The Department of Justice's Internet site maintains a list of principal FOIA contacts for each federal agency. The list contains the name of the principal contact, address, phone, and in some instances the e-mail address. Each federal agency is responsible for meeting its FOIA responsibilities for its own records.

Under the California Public Records Act (PRA), every person is allowed to inspect and obtain copies of public records that are not exempt from disclosure. If a portion of the record is confidential, the person generally may obtain the remainder of the record after that portion has been redacted.

Currently, the Act requires that all state and local agencies make public records available for public inspection during office hours, unless exempted by law. The act further requires that if a state agency withholds any public record, it must demonstrate that 1) the record was exempt from disclosure, or 2) the public interest for nondisclosure outweighed the public interest for disclosure.

Within 10 days after receiving a request for a record, each agency must determine whether the request seeks public records that can be disclosed. In unusual circumstances the 10-day time limit may be extended. The agency then must provide the requester with a written notice, explaining the reasons for the extension and the date on which a determination can be expected to be provided. Upon request of an identifiable record, the agency will make the record available promptly to the requester once the duplicating or statutory fee is paid.

In addition, Executive Order S-03-06 signed by Governor Schwarzenegger on March 29, 2006, requires state agencies to establish or review their written guidelines for accessibility of records; identify and designate members of their staff who are primarily responsible for receiving and responding to PRA requests; and submit a written certification to the Legal Affairs Secretary that the designated staff members have been trained on the responsibilities and requirements of the PRA.

If a taxpayer makes a request to the Franchise Tax Board (FTB) under the PRA, all requests for copies of records are to be made in writing. FTB will also honor oral requests. The records are reviewed by FTB's Disclosure Section to determine whether they contain any exempt material prior to copies being made for a member of the public.

THIS BILL

This bill would require every state agency that maintains an Internet site to include on the homepage the words "Public Information Center" displayed clearly without scrolling. Those words would be followed by or would link to another page showing all of the following:

- Under the words "Whom to Contact," the name, title, mailing address, telephone number, and e-mail address of the public information officer or other person(s) to whom requests for

inspection or copying of records or informal requests for simple factual information should be directed.

- Under the words "How to Request Records," the written guidelines authorized or required under "Whom to Contact" and a form in HTML language for submitting online requests consisting of all of the following labeled fields:
 1. Today's date.
 2. My name (optional).
 3. My e-mail address (optional).
 4. My postal address (optional).
 5. My telephone number (optional).
 6. I am interested in the following records or information.
 7. Where can I inspect these records?
 8. Send me copies of the records without inspection.
 9. Send me a fee estimate before copying.
- The form would be designed to send a copy of the request immediately and automatically to the e-mail address from where it was sent.
- Within 24 hours after its filing, under the words "Officials Economic Interests," the most current statement of economic interests filed by every officer, employee, or consultant of the agency required to be filed by law.
- Within 24 hours after its effective date, under the words "Officials' Employment or Consulting Contracts," all terms of every employment, consulting, or other contract for services that the agency and any individual are or have been parties to in the current calendar year.
- Within 24 hours after its effective date, under the words "Lawsuit Settlements," the full text of every settlement of litigation and of every agreement to compensate any person for foregoing litigation involving the agency as a party within the current calendar year.
- Under the words "Records Disclosed This Year," a copy of every record disclosed by the agency without redaction within the current calendar year or if a particular request exceeds 10 pages, a copy of the requester's own description of the records that were produced.
- Under the words "Records Withheld This Year," a copy of every letter or other communication to a requester that was denied access to all or part of any record sent within the current calendar year.
- Beginning January 1 in the second year after the effective date of this section, under the word "Archive," a link to a term-searched archive of the items posted under each of the headings in preceding years.

This bill would permit a court to order an agency that failed to post either the contact information for the agency's Public Information Officer or the form for requesting copies of records or has fallen more than 15 days behind in posting or archiving information to comply with the provisions of the bill. This bill would require an agency to post immediately after the heading "Our Failure to Comply," a copy of the court's findings for each item for which the agency failed to comply. The duration of the posting would be determined by the court, but would be at least 30 days.

This bill would award \$100 per day to a plaintiff if a court finds an agency's action results from any of the following:

- Declining to comply with a request to inspect or copy a record that is publicly accessible.
- Delaying in responding or producing the requested records without stating a reason or the reason is unsupported by compelling circumstances or otherwise demonstrates a lack of diligence required to make the records available promptly.
- Imposing conditions that are unauthorized under the PRA, including requesting payment in excess of applicable statutory fee.
- Delaying timely and complete access.
- Acting in bad faith and with the knowledge that the request sought nonexempt records.

This bill would require a court to consider all the facts and circumstances surrounding the agency's decision including, but not limited to the following:

- Whether the agency unreasonably failed to respond within the set timelines or otherwise engaged in conduct that caused undue delay.
- Whether the agency's justification for denying the request was based upon its perceived obligation to protect the rights of persons or entities identified in the requested records.
- Whether the agency has developed internal operating procedures and guidelines under this section.
- Whether the plaintiff acted in good faith while pursuing the request.
- Whether the agency's denial or other conduct inconsistent with the provisions of this bill was based on a reasonable interpretation of the law.

This bill would designate the person identified in the agency's notification of denial as liable for the award of \$100 per day if a court finds the agency's denial or other conduct was not based on a reasonable interpretation of the law, was unsupported, or uniformly contradicted by legal authority interpreting or applying the provisions of this bill. If the notification of denial failed to be made or failed to name the responsible person, the liability would be upon the agency's chief executive officer or the attorney that provides the advice of counsel, if denial or other conduct was based on that advice. The information provided by legal counsel or other communication would not be privileged and can be disclosed under the Evidence Code or any other provision of law if the plaintiff makes a preliminary showing that the agency's denial was not based on a reasonable interpretation of the law and unsupported or uniformly contradicted by relevant legal authority.

This bill would limit the award to a total of \$10,000 for the record or records in question. The period for an award would exclude the time when a request is pending with the Attorney General or when the court is considering the plaintiff's petition.

This bill would outline the duties of the court if a plaintiff brings an action against an agency for failure to comply with the requirements under this bill.

IMPLEMENTATION CONSIDERATIONS

This bill would have a significant impact upon the department. The department has identified the following implementation concerns. Department staff is available to work with the author's office to resolve these and other concerns that may be identified.

The statement of economic interests requires state and local government officials and employees to disclose personal assets and income publicly. The statement also includes an employee's full name, address, phone number, and e-mail address. This statement can currently be requested under the PRA. However, disclosure of personal information of this nature via the Internet would expose FTB employees required to file the statement to increased potential for threats, harassment, and identity theft.

This bill requires information to be posted within 24 hours. The department would interpret this provision to exclude hours during weekends and holidays. If the author's intent is different, it is recommended that the bill be amended to include weekends and holidays expressly.

The department has approximately 3,500 employees who file a statement of economic interests. In order to meet the 24-hour posting requirement, the department would require additional employees. Additional employees would be needed to handle the new volume of information that would be required to be reviewed and posted.

The bill uses the term "settlement of litigation" but lacks a definition. The department would interpret this provision to mean settlements of pending lawsuits. If the author's intent is different, it is recommended that the bill be amended to specify the author's intent.

Under the PRA, agencies have 10 days to acknowledge receipt of a request. After acknowledgement, an agency is required to estimate when the requested records will be available, depending on, among other things, the volume of documents requested. It appears this bill would change current law so that a department would have 15 days to identify and produce the requested records. Many PRA requests made to FTB require the production of thousands of pages of records. The time required to identify documents responsive to a request, to review the responsive documents, to redact confidential taxpayer information, to prepare a privilege log, and to copy records can take several weeks to complete. It would be extremely difficult for the department to meet a 15-day timeframe for all requests.

This bill could result in abuse by tax protestors. Many requests for records made to FTB are from persons who object to the concept of the state income tax. Requests from such taxpayers are made to waste state resources and to direct FTB personnel away from tax collection duties. The author may wish to add a provision that limits requests made in bad faith and solely to abuse the process.

It is unclear if the provision requiring a copy of every record disclosed without redaction means only documents released without redaction or all documents regardless of what was redacted. Most PRA records are over 10 pages and would not be posted. Clarification of this provision would assure that the correct documents are posted.

The PRA currently requires an interactive process between the requester and a state agency to clarify, assist, and identify appropriate records. FTB's Disclosure Section ensures the administration of the PRA is carried out by working with a requester if the description of a record is unclear. Under this bill, it appears that the requester could remain anonymous for requests made on the web site. This could frustrate the current interactive process. The author may wish to add a provision to require the requester's contact information to be deleted before the request is posted to the website to maintain privacy.

Although, the bill identifies the requester's email address as an optional field, the form would be sent automatically from the email address it was sent. Therefore, it appears that the email address is a required field. The author may wish to remove the term "optional" from the "My e-mail address" field.

Because other fields on the HTML form make the requester's postal address and phone optional, it might be difficult for the department to send the requester paper copies of records. In addition, if the requester only provides an email address, there may be limitations placed by the requestor's Internet Service Provider (ISP) on email size. To ensure the requested records are provided and compliance with the provisions of this bill, the form should require the requester's postal address.

It is unclear if the department could make some corrections to the original request for clarity purposes before posting the request to the web site or if the request must be posted as originally written.

An employee of the department is an agent acting on behalf of the department. FTB's Disclosure Section staff is responsible for drafting and signing correspondence to a requester. The actions taken by the Disclosure staff are made under the requirements of the PRA and department policy. The author may wish to place the \$100 fine upon the agency itself instead of on individuals within the agency.

The term "Public Information Center" could cause confusion for taxpayers that use FTB's web site. This link could appear to taxpayers as a quick link specifically for tax information. The department has conducted usability tests in the past and found that the term "center" could imply anything from a repository to a physical structure. The author may wish to use a term such as "Public Record Requests" or something similar to clearly identify for the public the link to request public records.

FTB uses Google as the general search engine for the department's web site because Google works best for content that is widely linked and frequently requested. It is unclear if the term used in the bill, "term-searchable archive" would require a separate search engine or if Google would satisfy this requirement. Maintenance and updates to a search engine used for a limited purpose could redirect department resources away from other required web site updates, such as tax forms and publications for current year filing.

This bill would require the department to post a copy of original requests and requested records on the department's web site. Depending on the document type, it may need to be scanned for posting on the department's web site. The scanned document could result in a situation where a person who relies on optical character recognition software (screen readers) could have difficulty

accessing the record. In this instance, that person would need to contact the department directly to receive hard copies of the requested record.

TECHNICAL CONSIDERATIONS

The bill specifies that the form must be designed using the HTML format. This would restrict the use of alternative or future technology. Requiring agencies to maintain a format that is obsolete could cause complications and increase costs. The author may wish to amend the provision to specify HTML, alternate, or successor technology.

LEGISLATIVE HISTORY

AB 1014 (Papan, Ch. 355, Stats. 2001) requires a state or local agency to estimate the date and time when a public record that can be disclosed will be made available. This law also requires a state or local agency to identify, describe, and assist the requester with reasonable options to obtain records responsive to their request or inquiry.

AB 2799 (Shelley, Ch. 982, Stats. 2000) requires a denial of requests for public records to be in writing.

SB 48 (Sher, 1999/2000) and SB 2027 (Sher, 1999/2000) would have amended the California Public Records Act to require that state agencies justify the withholding of any record by demonstrating in writing that a record is exempt from disclosure or the public interest is served by not making the record public. These bills would have established a procedure to allow any person to appeal to the Attorney General (AG) if a state or local agency denies access to a public record or subverts the intent of the bill by actions short of denial of inspection. SB 48 was vetoed by Governor Davis. The veto message states, "SB 48 creates an Attorney General appeals process that will lead to inherent conflicts of interest between the Attorney General and his major clients, the state agencies and departments. Consequently, this bill could result in uneven legal representation and increased use of costly outside counsel by the agency or department. Finally, the costs to comply with this bill would be borne by the General Fund and would likely be significant. . . . The bill sets up a bureaucratic reporting mechanism, involving the preparation, posting and mailing of AG opinions on the merits of a state agency's decision to withhold requested information. The costs to comply with this bill would be borne by the General Fund and would likely be significant."

AB 179 (Bowen, 1997/98) would have required any agency that has public information to provide the information in an electronic format upon request and that direct costs of duplication include the costs related to duplicating the electronic record. This bill was vetoed by Governor Pete Wilson. The veto message states, "A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional burden makes it 'unreasonable.' Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done."

FISCAL IMPACT

As stated under "Implementation Considerations," the department would need additional personnel to meet the specified timeframes and to respond to requests under this bill. The additional personnel, along with existing staff, would also be required to do the following: create the online form, conduct usability testing, conduct focus group research to identify the best link text and most effective search terms, analyze requests, redact and post requester's documents, update other documents as required to be filed under this bill, and maintain the web page.

The department's preliminary costs are estimated to be approximately \$218,255 for two personnel years (PY) in the Disclosure Section and one new PY in the Legal Department. As the bill continues to move through the legislative process, costs may be modified and, if necessary, an appropriation requested.

ECONOMIC IMPACT

This bill would not impact the state's income tax revenue.

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